In the Supreme Court

OF THE

UNITED STATES.

OCTOBER TERM, 1902.

The San Jose Land & Water Company,
Plaintiff in Error,
vs.
The San Jose Ranch Company,
Defendant in Error.

BRIEF FOR THE DEFENDANT IN ERROR.

I.

The court has no jurisdiction of this cause.

This was a suit under the statute of the state of California, to determine adverse claims to the property involved. The plaintiff's allegation is that it is, and for a long time hitherto has been, the owner of that tract of land, and the defendant claims an estate or interest in the land, adverse to the plaintiff. And the defendant's claim is averred to be without right, etc.

Trans. pp. 1-2.

Of course the complaint does not present any claim of any kind under the constitution or any law of the

United States, nor does the answer raise any such question.

Trans. pp. 2-8.

In the findings of fact the act of March 3, 1871, entitled "An act to incorporate the Texas & Pacific Railroad Company, and to aid in the construction of its road, and for other purposes," is referred to.

Trans., Finding 4, page 5.

And is again referred to,

Findings 6-7, pp. 5-6.

And the act of July 27, 1866, is referred to in finding 9, but only to the extent of stating that the land in controversy is within the indemnity limits of the Alantic & Pacific Railroad Company under that act, and the route designated by the company.

No other act of Congress is referred to in the findings at all The constitution is nowhere mentioned, and, in fact, no question of constitutional law is involved in the case.

Now the jurisdiction of this court upon a writ of error to the highest court of the state, as declared by the act of Congress, is:

1. Where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against the validity.

But no question is made anywhere in this case of the validity of any treaty or of any statute, or any authority exercised under the United States.

2. Or where is drawn in question the validity of a statute of, or an authority exercised under, any state on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of their validity.

But there is not here drawn in question the validity

of any statute of the state of California, or any authority exercised under the state.

3. Where any title, right, privilege or immunity *is claimed* under the constitution, or any treaty or statute of, or commission held, or authority exercised under the United States, and the decision is against the title, right, privilege or immunity, specially set up or claimed by either party under such constitution, treaty, statute, commission or authority.

Revised Statutes, Sec. 709.

Under this provision, if any, the jurisdiction of this case must come. But now it is the settled law of this court that under that provision the claim must be specifically made. And more than that, such right or title must be specially set up or claimed on the record.

Murdock v. Mayor and Aldermen of Memphis, 20 Wal. 590; 22 L. Ed. 429, 444;

Clark v. Pennsylvania, 128 U. S. 395; 32 L. Ed. 487-488.

The arguments of counsel cannot be looked into to show a federal question.

Sayward v. Denny, 158 U. S. 108; 39 L. Ed. 941;

Zadig v. Baldwin, 166 U. S. 485; 41 L. Ed. 1087.

Nor are the assignments of error available to show the federal question, for they are not a part of the record.

Sayward v. Denny, *supra*.

Fowler v. Warren, 164 U. S. 252; 41 L. Ed. 424.

Nor is it sufficient that such a claim appears in the petition for the writ.

Clark v. Pennsylvania, *supra*.

Nor can it be made out by the certificate of the judge.

Caperton v. Ballard, 14 Wal. 216; 20 L. Ed. 885;

Dibble v. Bellingham, etc., 41 L. Ed. 72.

The claim made must be distinct and positive, and not left to mere inference. "Specially set up" means unmistakably, distinctly and positively brought to the attention of the court.

Oxley Stave Co. v. County of Butler, 166 U. S. 648; 41 L. Ed. 1149, 1151;

Green Bay & Miss. Canal Co. v. Patten Paper Co., 172 U. S. 58; 43 L. Ed. 364, 368-369.

A special reference must be made to the particular statute or law of the United States under which the party claims.

Speed v. McCarthy, 181 U. S. 269; 45 L. Ed. 855, 858-859.

This court sometimes takes jurisdiction where it manifestly appears from the record that a federal question was involved, but that is not done when the case comes under the particular provision of the act of Congress which we are now considering.

Eastern Building Association v. Welling, 181 U. S. 47; 45 L. Ed. 739, 741.

At this page, the court said:

> "The assertion that although no federal question was raised below, and although the mind of the state court was not directed to the fact that a right protected by the constitution of the United States was relied upon, nevertheless that it is our duty to look into the record and determine whether the existence of such a claim was not necessarily involved, is demonstrated to be unsound by a conclusive line of authorities * * * The error involved in the above arises from failure to observe that the particular char-

acter of federal right which is here asserted is embraced within those which the statute requires to be 'specially set up or claimed'. The confusion of thought involved in the proposition relied upon is very clearly pointed out in the authorities to which we have referred, and especially under the latest case cited, the Columbia Water Power Co. vs. Columbia Electric Street R. Light & Power Co."

(The stars above stand for the authorities cited.)

Now, as already stated, in the judgment record in this case consisting of the pleadings, findings of fact and judgment, there is no act of Congress mentioned except certain acts under which it is not pretended that the plaintiff in error does claim.

Whatever rights for which he invokes the protection of any statute of the United States, are rights asserted under the act of March 3, 1887, but that act we say again, does not appear on the judgment record at all, nor does it appear in the only other place that it could have been made to appear in this case, namely, the statement on motion for a new trial. In that statement the only assignments of error, or specifications of errors of law, will be found at pages 19-20 of the transcript. The assignments are as follows:

"The plaintiff now assigns as error on said statement that there is no evidence sustaining the finding that the plaintiff did not own the property described in the complaint, and in the findings of the court. That the evidence clearly showed the fact that the plaintiff and its vendor both purchased the property in good faith, believing the title of the railroad company thereto to be valid, and had taken possession and made improvements upon said property, and expended money thereon in good faith. That under and by virtue of the *laws of the United States* they were entitled to purchase said property when the same came into the market, which right to purchase was good against the whole world, and could not be taken

away from plaintiff, either by a purchaser in good faith or by such trespasses as would deprive plaintiff of its rights by the statutes of limitations. All of which appears by the testimony in the case."

Trans. pp. 19-20.

Plaintiff assigned as further error that the decision and judgment of the court were contrary to the law in this, that it appeared from the undisputed evidence in the case that plaintiff and its vendors were *bona fide* purchasers and in possession of the property, and entitled to purchase the same from the United States government when the same came into the market; yet under this issue, which was material, and supported by abundant evidence to show the facts, the court failed to make any finding at all, and for this reason the plaintiff claims that it is entitled to a new trial in said cause.

Trans. p. 20.

Now this is all that appears upon this record in the nature of a claim made to the protection of any law of the United States. And all there is of that claim is that it was entitled to purchase under and by virtue of the laws of the United States, but no law is specified, and, more than that, it only claimed to be entitled to purchase when the same came in the market. This is not a sufficiently specific claim to the protection of any law of Congress under the authorities above cited. More than that, it does not appear that the decision of this court was at all controlled by any statute of the United States. The plaintiff in error claims under a contract between the Southern Pacific Railroad Company on the one side and W. D. Nolan and Jacob Heckenlively on the other, which was of date the 28th day of February, 1887.

Trans. pp. 6-8, finding 10.

There are three clauses in this contract to which we call attention:

1. They agreed to buy the land for $160, to be paid as follows: $32, and also $8.96, one year's interest in advance on the remainder, in United States gold coin, and the remainder, to wit, the sum of $128, with interest in advance at the rate of seven per cent. per annum, at its office in the city and county of San Francisco, on or before the 28th of February, 1892, and to pay all taxes and assessments that might be levied, etc.

Trans. pp. 6-7, fol. 12.

2. The next clause is that it was further agreed that the parties of the second part might at once enter upon, take and hold possession of such premises, provided, however, that if they failed to make any of such payments of remainder, or interest, taxes or assessments, or should fail to comply strictly with any of the stipulations of the contract, then this right should cease, and the party of the first part, its successors or assigns, might, without notice, enter upon, take and hold possession of said premises.

Trans. p. 7, fol. 13.

3. The third is that it was agreed that the contract should not be assignable except by indorsement, and with the written consent of the party of the first part, and the written promises of the assignee to perform all the undertakings and promises of the party of the second part, as above set forth.

Trans. p. 8, fol. 15.

Now it is found that Nolan and Heckenlively made this first payment and the annual interest had been paid up to February 28, 1892, and no other or further payments of interest or principal have been made.

Finding 11, p. 8, fol. 16.

It is shown, moreover, that neither Nolan and Heckenlively nor any of their assignees ever settled upon the tract or cultivated or fenced the same, or

any part thereof; all that was done was that Heckenlively did, shortly after the contract was executed, enter upon the land and commenced the construction of the ditch and tunnel.

Trans. finding 11, fol. 16, p. 8.

Then follow findings of the assignments, but none of them were ever consented to by the railroad company.

Finding 12, pp. 8-9, fol. 16.

Under these findings, independently of any question arising under the act of 1887, this plaintiff in error had no rights even under the Southern Pacific Railroad Company, and it does not appear, but the court may have so decided.

Furthermore, it is not only necessary to claim a right under the statute, but it must equally appear that that claim was denied. But it does not so appear. All that the plaintiff in error could claim under the act of 1887, even if it had made this specific claim, was the right to purchase the land, for that is all the right the act gives to a *bona fide* purchaser.

It will be observed that the statute of March 3, 1887, provides for two different classes of cases:

Section 4 provides for cases where a patent has been issued to the railroad company. In that case the purchaser, by making proof of the fact of such purchase, becomes entitled to a patent from the United States therefor, and when issued it relates back to the date of the original certification or patenting.

24 Stats. at L., p. 557, Sec. 4.

In this case no patent had issued, and the case then falls, if anywhere, under the 5th section, which simply declares that where the company has sold to citizens of the United States or persons who have declared their intention to become such, as a part of its

grant lands not conveyed, to or for the use of the company, etc., it shall be lawful for a *bona fide* purchaser thereof from such company to pay for it at the ordinary government price for like lands, and thereupon patents shall issue therefor to the said *bona fide* purchaser, his heirs or assigns.

24 Stats. at L., Sec. 5, p. 557.

That section does not provide that when the purchase is made and the patent issues it relates back to anything.

Now the court did not decide that the plaintiff in error had not this right to purchase. The point of the decision upon this question is that whether it had or not, it had not exercised it. It had neither purchased nor made any offer to purchase, and the lands belonged to the United States government, and the plaintiff in error could not, by any just interpretation of the statute, be entitled to all the rights in the land without purchasing or offering to purchase that it would have if it had purchased and paid for the land and obtained the patent.

It is submitted, therefore, that no right was specially claimed, or set up under any statute of the United States, nor was there any decision denying such right, and therefore the judgment should be affirmed or the writ dismissed.

II.

The plaintiff had no title under the facts as found in this case. Upon this subject it is doubtless sufficient to refer to the opinion of the Supreme Court of California, which will be found in the transcript, pages 28-33, and the authorities cited.

129 Cal. 673.

But we may remark further, that even if it were true that any "inceptive right" was acquired under the fifth section by a *bona fide* purchase of the tract of

land from the Southern Pacific Railroad Company, and the plaintiff in error or its assignors were such *bona fide* purchasers, or that either of them had complied with the contract of purchase with the Southern Pacific Railroad Company; in other words, if all the rights given by the fifth section existed in their case this "inceptive right," to be available, must be connected with something more than an inceptive right. The inceptive right cannot be both inceptive and final. The proof of this *bona fide* purchase must be made to the Land Department, and, being made, the land must be paid for, and having been paid for, the patent will issue. But in this case no more than any other law for the disposition of the public lands, does any right accrue until the proof and payment are made. If it were otherwise, the plaintiff in error need never do anything. The statute doesn't seem to fix any limitation of time within which this right to purchase is to be exercised, and, according to its theory, it need never have anything but an inceptive right.

Sturr v. Beck was a totally different case. There an entry had been made under the homestead law, and they had thereby become vested with a title, not perfect, to be sure, but still a title.

Neither does the decision in St. Paul & Pacific Railroad Company v. The Northern Pacific Railroad Company, 139 U. S., p. 1, prove anything in favor of the plaintiff here. After withdrawal, it is said there, no interest in the land granted can be acquired against the rights of the company. But here the Southern Pacific Company never had any rights, and they were never withdrawn in the interest of that company, but the Atlantic & Pacific, under which the plaintiff in error here, does not claim. All persons being citizens or having filed their declarations of intention to become such, could enter lands under the homestead laws, but this does not give them a right until they

exercise that privilege. So here there is the right of this *bona fide* purchaser from the railroad company to purchase from the United States, but there is nothing in the act which makes it obligatory upon him to do so, and to say that neither the United States nor anybody else has any such interest in these lands, or can acquire any, whereby they can have any right or control over it at all, simply because one has a right to purchase who has never taken any step to exercise that right, nor shown any disposition to do so, is, we say again, to make it entirely unnecessary that he should ever purchase. A large number of cases are cited in the brief from the decisions of the Land Department, but they are only to the effect that a *bona fide* purchaser from the railroad company has the right to purchase from the United States; but that the statute says, and nobody has ever denied it in this case.

And it is respectfully submitted that if the court has any jurisdiction, the judgment should be affirmed on the merits.

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